

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SKYBRIDGE SPECTRUM FOUNDATION)	FOIA Control No. 2013-021
)	
WARREN HAVENS)	FOIA Control No. 2013-022
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2013

Released: September 17, 2013

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we dismiss as unacceptable for filing an application for review filed jointly by Warren Havens (Havens) and Skybridge Spectrum Foundation (Skybridge) (collectively “Havens” or “Requesters”).¹ Havens seeks review of a decision by the Office of General Counsel (OGC)² denying his Freedom of Information Act (FOIA) requests³ for documents submitted under a protective order in a Commission enforcement proceeding. We find that the AFR fails to comply with the procedural requirements for applications for review specified in our rules.

II. BACKGROUND

2. The Requests involve matters at issue in a hearing proceeding (EB Docket No. 11-71) in which the Commission designated issues against a company called Maritime Communications/Land Mobile, LLC (MCLM), to determine whether its wireless radio licenses should be revoked and its related wireless radio applications should be denied.⁴ The issues designated by the Commission include whether MCLM failed to disclose its real-parties-in-interest, whether MCLM made misrepresentations or lacked candor, whether MCLM committed rules violations, and whether certain of MCLM’s license cancelled for failure to construct or operate.⁵ Havens and affiliated entities are parties to the MCLM Proceeding. During the discovery phase of the MCLM Proceeding, MCLM and related companies, in particular, Pinnacle Wireless, Inc. (Pinnacle) and Puget Sound Energy, Inc. (Puget Sound) (collectively the

¹ See Application for Review: Review of Freedom of Information Act Action, filed January 4, 2013, by Warren Havens and Skybridge Spectrum Foundation (AFR). The AFR indicates that Havens is the president of Skybridge. Our reference to “Havens” thus refers to Havens personally and in his representative capacity.

² See Letter from Joel Kaufman, Associate General Counsel to Mr. Warren Havens (Dec. 5, 2012) (Decision).

³ See Letter from Skybridge Spectrum Foundation to Federal Communications Commission (dated Oct. 11, 2012, received Oct. 12, 2012); Letter from Warren C. Havens to Federal Communications Commission (dated Oct. 11, 2012, received Oct. 12, 2012) (collectively “Requests”).

⁴ See *Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd 6520 (2011) (HDO). We will refer to EB Docket No. 11-71 as the “MCLM Proceeding.”

⁵ See HDO, 26 FCC Rcd at 6547 ¶ 62.

“Submitters”), produced information subject to a protective order issued in the MCLM Proceeding by the presiding judge, Chief Administrative Law Judge Richard L. Sippel (ALJ).⁶

3. In his FOIA requests, Havens sought, among other things:

[C]opies of all documents and records, in their original form (electronic or hard copy), that any person or entity has submitted for purposes of the Hearing that [have] been designated as “confidential” or “highly confidential” under the protective order, Administrative Law Judge Order FCC 11M-21 (the “Protective Order”), including any cover letters or correspondence associated with them.⁷

Because the Submitters sought confidential treatment for the materials they produced, OGC notified the Submitters of the Requests, pursuant to 47 C.F.R. § 0.461(d)(3), to give them an opportunity to object to disclosure.⁸ The Submitters objected to disclosure on several grounds.

4. OGC withheld the responsive documents. OGC found that many of the documents requested might prove to be exempt under FOIA Exemption 4, which protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁹ OGC did not, however, reach this issue, because it found that the documents should be withheld under FOIA Exemption 7(A), which exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings.”¹⁰ Relying principally on *NLRB v. Robbins Tire & Rubber Co.*,¹¹ OGC found that that granting the Requests would interfere with the Commission’s enforcement action in the MCLM Proceeding.

5. Havens filed an application for review of OGC’s Decision disputing OGC’s application of Exemption 7(A).¹² Pinnacle filed an opposition that supported OGC’s Decision and argued that Havens’ AFR is procedurally defective.¹³ MCLM filed a motion to strike the AFR as procedurally defective.¹⁴ At OGC’s invitation, MCLM subsequently filed an opposition to the AFR agreeing with Pinnacle’s Opposition, supporting OGC’s Decision, and proposing additional grounds for withholding the documents.¹⁵

6. Both Pinnacle’s Opposition and MCLM’s Motion contend that the AFR fails in numerous

⁶ See *Protective Order*, FCC 11M-21 (Jul. 20, 2011) (Protective Order).

⁷ See Requests at 1.

⁸ See Decision at 2; Letter from David S. Senzel, Administrative Law Division to Robert J. Keller *et al.* (Oct. 25, 2012).

⁹ See Decision at 2; 5 U.S.C. § 552(b)(4).

¹⁰ See Decision at 3-6; 5 U.S.C. § 552(b)(7)(A).

¹¹ 437 U.S. 214 (1978).

¹² See *supra* note 1.

¹³ See Pinnacle Wireless Opposition to Application for Review, filed January 17, 2013 (Pinnacle Opposition). Havens filed a reply to Pinnacle’s Opposition. See Reply to Opposition to Application for Review: Review of Freedom of Information Act Action, filed January 30, 2013, by Havens (Reply to Pinnacle).

¹⁴ See Motion to Strike and Contingent Request to Defer Response Date, filed January 22, 2013, by MCLM (Motion).

¹⁵ See Maritime’s Opposition to Application for Review, filed February 22, 2013 (MCLM Opposition). See also e-mail from David Senzel to Bob Keller (Feb. 7, 2013) (inviting MCLM’s views on the merits). Havens filed a reply to MCLM’s Opposition. See Response [to] Opposition of Maritime to Application for Review: Review of Freedom of Information Act Action and Request for Sanctions under § 1.52, filed March 8, 2013, by Havens (Reply to MCLM).

respects to comply with the Commission's rules regarding applications for review.¹⁶ They assert that the AFR consists of 35 single-spaced pages, whereas 47 C.F.R. § 1.115(f) limits applications for review to 25 double-spaced pages. They also assert that section 1.49 of the rules requires a pleading of more than ten pages to have a table of contents and summary, which the AFR lacks.¹⁷ Finally, they submit that the AFR does not concisely and plainly state the questions presented for review or specify with particularity the factors set forth in the rules that warrant Commission consideration as required by section 1.115 of the rules.¹⁸ The Motion to Strike asks the Commission to dismiss the AFR with prejudice.

7. Havens addresses these procedural matters in the AFR and the Reply to Pinnacle's Opposition.¹⁹ He asserts that no formal procedural requirements apply to applications for review of FOIA decisions. He further asserts that the AFR is fewer than 25 pages in length, inasmuch as 30 pages of endnotes in the AFR should not be counted in determining its length. Additionally, Havens argues that, because he filed the AFR electronically, the provisions of Section 1.49, which govern paper pleadings, do not apply to the AFR.

III. DISCUSSION

8. Havens' argument that no formal requirements apply to FOIA AFRs is inconsistent with the Freedom of Information Act and our FOIA rules. By statute, FOIA requests are subject to the agency's rules regarding "the time, place, fees (if any), and procedures to be followed."²⁰ Section 0.461 of the Commission's FOIA rules states that "[f]or general procedures relating to applications for review, see § 1.115 of this chapter."²¹ Section 1.115 sets forth the Commission's rules for AFRs. Section 1.115(f) sets page limits for AFRs and provides that "[a]pplications for review, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52."²² Although OGC, as a matter of discretion, granted Havens' request to file the AFR electronically, it did not waive any other procedural requirements.²³

9. Section 1.115(f) provides that applications for review "shall not exceed 25 double-space typewritten pages." Havens' pleading consists of 35 single-spaced pages. Contrary to Havens' unsupported argument, our rules provide that page limits apply to pleadings filed in electronic form.²⁴ Further, Havens cites nothing, and we are aware of nothing that would support Havens' view that endnotes should not be counted in determining the length of a pleading. Accordingly, we reject that

¹⁶ See Pinnacle Opposition at 3; Motion at 1-3.

¹⁷ See 47 C.F.R. §§ 1.49(b),(c).

¹⁸ See 47 C.F.R. §§ 1.115(b)(1), (b)(2).

¹⁹ See AFR at 1 n.1; Reply to Pinnacle at 2-3.

²⁰ See 5 U.S.C. § 552(a)(3)(A)(ii); see also *Kemmerly v. U.S. Dep't of the Interior*, 430 Fed. Appx. 303, 305 (5th Cir. 2011) ("[The] FOIA expressly conditions the agency's obligation to process requests on the requester's compliance with 'published rules stating the time, place, fees (if any), and procedures to be followed.'"); *Fisher v. U.S. Dep't of Justice*, Civ. No. 07-2273 (RBK) (D.N.J. 2008), reported at 2008 WL 8683024 at *4 (requester failed to exhaust administrative remedies because he failed to comply with rules for filing administrative appeal).

²¹ See 47 C.F.R. § 0.461(j) Note.

²² See 47 C.F.R. § 1.115(f).

²³ See e-mail from Joel Kaufman to Jimmy Stobaugh (Jan. 4, 2013) (allowing Havens to file electronically).

²⁴ See 47 C.F.R. § 1.49(f)(3) ("For purposes of paragraph (b) and (c) of this section, and any prescribed pleading lengths, the length of any document filed in electronic form shall be equal to the length of the document if printed out and formatted according to the specifications of paragraph (a) of this section, or shall be no more than 250 words per page.") The fact that a party like Havens, who frequently participates in Commission proceedings and is very familiar with our rules, would ignore this rule and argue that the accommodation allowing him to file his AFR electronically eliminates the page limits strikes us as entirely unreasonable and lacking in good faith.

argument. We also note that Section 1.49(a) cautions counsel against using extended single-spaced passages or excessive footnotes to exceed the page limits. While Section 1.49(a)'s caution is directed at counsel and does not refer to endnotes (as opposed to footnotes), the Commission has inherent authority to prevent evasion of its page limits,²⁵ and we would use that authority to prevent the use of single spaced endnotes to evade our page limits.²⁶ But, it is not necessary to look to such inherent authority since the AFR is 35 pages long even with single spacing. Accordingly, notwithstanding Havens' unsubstantiated assertion that the AFR could be reformatted to comply with the page limit in our rules,²⁷ we find that the AFR, as submitted, substantially exceeds the applicable page limit.

10. Page limits serve the important function of requiring parties to write concise pleadings that focus on the important issues,²⁸ which allows both the decision-maker and opposing parties to focus on the key issues in a case. Havens' 35-page, single-spaced AFR greatly exceed the limit of 25 double-spaced pages set forth in our rules and is by itself a flagrant violation of those rules. Further, there are several factors that make his violation even more egregious. Havens did not seek leave to exceed the page limit. Nor do we see any reason that would have led us to grant such a waiver had Havens sought one. There is indeed nothing about the issues raised here that would justify a pleading of more than standard length. Rather, the excessive length of the AFR appears to reflect Havens' failure to take the time and effort to exclude extraneous and irrelevant material. For example, the majority of the AFR consists of block quotations, including endnotes, from the 2004 Department of Justice *Guide to the Freedom of Information Act* (FOIA Guide),²⁹ much of which Havens himself recognizes as irrelevant to the issues before the Commission.³⁰ Havens often simply quotes a section of the FOIA Guide and states

²⁵ See *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984) ("pro se litigants are not excused from failing to comply with substantive and procedural law"); *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1984) ("We think the broad congressional power to authorize agencies to adjudicate 'public rights' necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency's adjudicatory proceedings."); see also *Warren C. Havens*, 27 FCC Rcd 2756 2759 ¶ 10 (2012) (Commission's inherent authority to regulate its proceedings permits it to impose sanctions on non-attorneys as well as attorneys for filing frivolous pleadings).

²⁶ We would not reject a single spaced FOIA AFR as long as the single spacing did not evade the double spaced 25 page limit and otherwise complied with our rules. Thus, Havens' reference to single spaced FOIA AFRs that were not rejected for filing does not demonstrate any inconsistency with our decision here. See Reply to Pinnacle at 2.

²⁷ Havens' suggestion that a 35-page single-spaced pleading could be reduced to 25 double-spaced pages by changing the font, margins, and other formatting aspects (see Reply to Pinnacle at 3) is implausible and seems to lack a good faith basis inasmuch as the rules require the use of at least 12-point font and margins totaling 2 inches. See 47 C.F.R. § 1.49(a). Moreover, as noted above, Section 1.49(f)(3) provides that "[f]or purposes of paragraph (b) and (c) of this section, and any prescribed pleading lengths, the length of any document filed in electronic form shall be equal to the length of the document if printed out and formatted according to the specifications of paragraph (a) of this section, or shall be no more than 250 words per page." As MCLM indicates, the maximum word count of an electronically filed application for review at the maximum 25 page limit with 250 words per page is 6,250 words, whereas the AFR is 15,045 words long. See Motion at 2.

²⁸ See *Fleming v. County of Kane*, 855 F.2d 496, 497 (7th Cir. 1988) (page limitations encourage litigants to hone their arguments and to eliminate excessive verbiage); *Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp.2d 755 (D. Ariz. 2012) (judicial economy and concise argument are purposes of the page limit); *Burger v. Kuimelis*, 325 F. Supp.2d 1026, 1031 (N.D. Cal. 2004) (the page limit forces moving parties to focus their discussion on the most important issues).

²⁹ We note that a copy of the FOIA Guide is available via the FCC website at <http://www.fcc.gov/foia> (under "Quick Links.")

³⁰ Havens notes that 30 pages of the AFR consists of 104 endnotes, only some of which are relevant to the AFR. Havens suggests that the irrelevant endnotes "should be deemed stricken." See AFR at 5. We know of no authority, however, that requires us to edit a pleading in order to make it comply with a page limit. We decline to do so.

in a conclusory fashion: “The [Decision] did not meet the above requirement” or something similar.³¹ Accordingly, we see no justification for Havens’ having substantially exceeded the page limit for AFRs. In sum, Havens’ flagrant disregard for our page limits is unacceptable, especially taking into account the fact that Havens is a frequent participant in Commission proceedings and is very familiar with the Commission’s rules. In view of this blatant and egregious noncompliance with our rules, we dismiss the AFR as unacceptable for filing.³²

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that the application for review by Warren Havens and Skybridge Spectrum Foundation IS DISMISSED. Havens and Skybridge may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).³³

12. The officials responsible for this action are the following: Acting Chairwoman Clyburn, and Commissioners Rosenworcel and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ See AFR at 3-5.

³² *Kenter Broadcasting Co.*, 62 P&F Radio Reg. 1573 ¶ 9 (1986) (application for review dismissed for exceeding page limit). See also *Snyder v. HSBC Bank, USA, N.A.*, *supra* note 28 (district courts have in their discretion imposed various sanctions for improperly filing overlong briefs). Because violation of the page limits is grounds for dismissal, we also need not address the other procedural infirmities alleged by the parties such as the lack of a table of contents or a summary or the failure to state with particularity the issues warranting Commission review. For the same reason, we need not reach the parties’ arguments on the merits of the AFR.

³³ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Havens’ right to pursue litigation. Havens may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - Room 2510
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 877-684-6448.